87-1942

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF FLORIDA,

Petitioner,

vs.

HORACE BROWN,

Respondent.

ON WRIT OF CERTIORARI TO THE
FLORIDA SUPREME COURT

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QUESTION PRESENTED

If a judge in a bifurcated capital murder trial rules immediately after the defendant is convicted that he cannot be subjected to the death penalty for his crime under the Eighth Amendment to the United States Constitution, and that judge then proceeds to cancel the penalty phase of the trial and sentences the defendant to life imprisonment, may an appellate court overrule the trial court, vacate the life sentence and remand for resentencing without violating the Double Jeopardy Clause of the United States Constitution?

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The opinion of the Third District Court of Appeal of Florida vacating respondent's life sentence and remanding his case for a full consideration on the applicability of the death penalty is found at Brown v. State, 501 So.2d 1343 (Fla. 3d DCA 1987). It is reproduced in the appendix as Exhibit "A". (App. 1-11).

The opinion of the Florida Supreme Court reinstating respondent's life sentence can be found at Brown v. State, ____ So.2d ____, (Fla. 1988); 13 F.L.W. 69 (Fla. February 4, 1988). That opinion is reproduced in the appendix as Exhibit "B." (App. 12-19).

Finally, the order denying the state's motion for rehearing is also in the appendix as Exhibit "C." (App. 20).

STATEMENT OF JURISDICTION

The opinion of the Florida Supreme Court which the state asks this Court to review was entered on February 4, 1988. The state's motion for rehearing was denied on March 25, 1988. This petition was filed within 60 days of that denial. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Horace Brown, the respondent, was charged with the execution-style murder of a drug dealer named Orlando Gomez. The state was seeking the death penalty.

Florida employs a bifurcated system for the prosecution of capital murder cases. In the first phase, the trier of fact determines the defendant's guilt or innocence. If convicted, the defendant then undergoes a separate sentencing proceeding. The state has the right in that proceeding to present evidence to the trier of fact in support of its contention that death is the appropriate penalty. The trier of fact is guided by well defined standards as to what it may consider in reaching its decision on the sentence to be imposed. The state must prove each statutory aggravating factor

beyond a reasonable doubt. The sentencer then has the option to impose either life imprisonment or death. Section 921.141, Florida Statutes (1981).

The evidence adduced in the guilt phase of Brown's trial established that he had ordered a henchman to murder the victim, a drug dealer with whom Brown had been doing business. The motive was economic. Brown was attempting to "rip-off" his victim for either drugs or money. The jury returned a guilty verdict. Brown stood convicted of first degree murder.

It was at this point that Brown acted to prevent the state from going forward with the sentencing phase of his trial. He argued that since he had not personally killed the victim, the Eighth

Amendment to the United States Constitution barred the imposition of the death penalty in his case. Brown relied upon this Court's decision in Enmund v. Florida, 458 U.S. 782 (1982) as his authority. He moved the trial court to a.) discharge the jury and b.) summarily sentence him to life imprisonment.

The state objected, pointing out that Enmund only applied to certain felony murder defendants, and that Brown's culpability was based on the fact that he had actually ordered the Gomez murder.

The trial court agreed with Brown. The jury was discharged and a life sentence was imposed. No separate sentencing proceeding was ever held.

Brown appealed his conviction to the Third District Court of Appeal of

Florida. The state cross-appealed the trial court's imposition of the life sentence. The court affirmed the murder conviction and vacated the life sentence. Brown's Enmund claim was rejected as being inapplicable to any person who orders the death of another. The case was remanded to the trial court for the holding of a full sentencing proceeding in accordance with Florida law. (App. 9-11)

Brown sought relief in the Florida Supreme Court. That court found that the trial court's ruling on the Enmund claim was indeed erroneous, and that Brown could have been lawfully subjected to the death penalty for his crime. Nevertheless, the court went on to hold that double jeopardy principles would forever prevent the state from exposing

Brown to the possibility of a death sentence. Relying expressly on this Court's decisions in Bullington v. Missouri, 451 U.S. 430 (1981) and Arizona v. Rumsey, 467 U.S. 203 (1984), the court held that double jeopardy protection would extend to Brown's life sentence. Even though the state was never allowed to present its case to the sentencer, Brown was deemed "acquitted" of the death penalty when the trial court ruled favorably on his Enmund motion. Jeopardy attached at that point. The life sentence was reinstated. (App. 16-19).

ARGUMENT

Why Review Should Be Granted.

Capital trials are made up of two stages. The state first establishes the defendant's guilt of the substantive offense. Having done that, the state then goes on to present evidence to the sentencer in support of its position that the death penalty should be imposed. If that sentencer rejects the state's position in favor of a life sentence, the defendant is deemed "acquitted" of the death penalty, and jeopardy attaches to that sentence. Having had its chance to prove its case on the appropriateness of the death penalty, and having failed, the state is barred by the double jeopardy clause

from getting a second opportunity. If that defendant were ever re-tried, the state could seek no penalty greater than life imprisonment.

The Florida Supreme Court has upset that formula by moving the point at which jeopardy attaches. A defendant can now be acquitted of the death penalty **before** the state has the opportunity to submit penalty-related evidence to the sentencer. Jeopardy can now attach by virtue of a ruling on a defense motion made prior to the commencement of the sentencing phase. Since jeopardy has attached, the state cannot overturn that ruling on appeal with the hope of continuing the trial. The result is that prosecutors are no longer assured that they will have one full opportunity to obtain a death

sentence against a defendant convicted of a capital offense.

This is an important development in modern constitutional law. It marks the first time that the double jeopardy clause has been used to prevent the state from proceeding not with a second attempt to obtain a death sentence, but with beginning its first.

The attachment of jeopardy is of special importance to the prosecution because of the attending finality it ensures. This is especially true in a bifurcated capital trial. Here, incorrectly fixing the point at which jeopardy attaches can translate into an undeserved windfall for the defense. A convicted person who should be forced to face the possibility of society's ultimate penalty can escape justice if

the trial court makes an incorrect ruling on an issue unrelated to the merits of the state's case against him.

The attachment of jeopardy should be of special importance to this Court because of its direct relationship to meaningful appellate review. The Eighth Amendment has been interpreted to require appellate courts to prevent the freakish and arbitrary imposition of the death penalty. They do that by being the final arbiters of constitutional issues and by eliminating the creation of arbitrary distinctions in capital cases. If a trial court's erroneous decisions on constitutional questions are not subject to correction because jeopardy had supposedly attached, then the trial courts become the final arbiters of constitutional law. The

death penalty will inevitably be applied arbitrarily. This case is a perfect example of that. The Florida Supreme Court recognized the error the trial court committed in ruling the death penalty violative of the Eighth Amendment. However, because the court found that jeopardy had attached, it could not correct that error.

The ramifications of this case are far-reaching. Appellate courts nationwide must be able to prevent the arbitrary misapplication of controlling precedent in death cases. If an improper ruling on when jeopardy attaches threatens to impede them in their efforts, this Court must intervene.

Overview

Horace Brown's guilt phase ended in his conviction for capital murder. He then moved to prevent the commencement and submission of the state's case against him in the penalty phase. He interposed the argument that the Eighth Amendment to the United States Constitution barred any penalty greater than life in prison. His argument made no reference to those aggravating or mitigating factors universally relied upon in capital sentencing proceedings to arrive at a sentence. No evidence was ever adduced by either party. He simply presented the court with a threshold legal question on why the Eighth Amendment allegedly mandated a halt to his trial.

The trial court's acceptance of Brown's argument resulted in a quick end to the proceedings. The state was never given the chance to fully prosecute its case and put its evidence before the sentencer. The Florida Supreme Court's ruling that jeopardy attached to Brown's sentence at this early juncture would, if allowed to stand, signal a clear break from established precedent. Behold:

Horace Brown was not "acquitted" of the death penalty for double jeopardy purposes.

Two cases of this court, Bullington v. Missouri, supra, and Arizona v. Rumsey, supra, have addressed the application of the double jeopardy clause to bifurcated capital trials. Those cases introduced and reaffirmed

the concept of an "acquittal of the death penalty."

The capital sentencing procedures in Missouri and Arizona resemble the procedures in a jury trial on the issue of guilt. For that reason a capital sentencing proceeding cannot be distinguished from a normal trial for double jeopardy purposes. Jeopardy attaches to the sentence which emerges just as it attaches to an acquittal of the substantive charge.

Mr. Bullington was convicted of capital murder. At the statutorily mandated sentencing hearing, the prosecution presented evidence and argued that the death penalty should be imposed. The jury's sentencing verdict, however, fixed Bullington's punishment not at death, but at imprisonment for

life. Bullington later obtained a new trial, and the prosecution announced its intention of again seeking the death penalty. This Court eventually granted review on the double jeopardy question involved.

After concluding that Missouri's capital sentencing procedure resembled a trial on the issue of guilt or innocence, this Court held that the jury's verdict imposing a life sentence constituted a determination that the prosecution had failed to "prove its case" that Bullington deserved the death penalty. Thus, the double jeopardy clause precluded imposition of the death penalty at Bullington's second trial.

In Rumsey this Court was presented with only a slightly different scenario. The defendant had been con-

victed, and the state then presented its evidence on the appropriate sentence. The judge, who is the sentencer in Arizona, misinterpreted the law as to one of the aggravating factors the state relied upon and sentenced Rumsey to life.

The error committed during the course of Rumsey's completed sentencing proceeding did not change the character of the court's acquittal of him any more than an error during the guilt phase would have detracted from his acquittal of the substantive charge. Mr. Rumsey's life sentence was found to be an acquittal on the merits because both parties were able to fully present evidence on the issue of the appropriateness of the death penalty in a completed penalty phase.

One crucial fact serves to distinguish Brown's case from both Bullington and Rumsey. Here, Brown's life sentence was not the result of a completed penalty phase. The state was not allowed to put forward any evidence. No weighing of aggravating or mitigating factors took place. Brown's sentence was not the result of a proceeding which bore any of the hallmarks of a trial on the merits. It therefore cannot be said that the state either failed to prove its case or that the trial court's life sentence was tantamount to an acquittal of the death penalty for double jeopardy purposes.

The Florida Supreme Court's reliance on and extension of Rumsey to pre-penalty phase rulings on constitutional issues marks the beginning of an unwel-

come chapter in double jeopardy litigation. As was noted in Bullington, this Court has consistently resisted attempts to extend the double jeopardy clause so as to limit sentences on retrial of a defendant. It only granted Mr. Bullington that protection because he had specifically been acquitted of the death penalty at his first trial. That is not the case here.

Florida's capital sentencing scheme is indistinguishable from either Missouri's or Arizona's for double jeopardy purposes. Jeopardy should only attach after the sentencing phase has run its course. That is the clear message of Bullington and Rumsey. In spite of those cases, the Florida Supreme Court would extend double jeopardy protection to defendants in

capital cases before they are exposed to the rigors of a sentencing hearing. All a defendant would have to do is make a motion to the court and jeopardy would attach. To specifically rely upon Bullington or Rumsey for the proposition that jeopardy would attach at that early juncture is patently improper.

Jeopardy did not attach because Brown himself sought and obtained a premature end to the prosecution.

There is also a second consideration which bolsters the state's position in this case.

This Court has held, in United States v. Scott, 437 U.S. 82 (1978), that double jeopardy is not a bar to retrial in cases where the defendant himself seeks and obtains an early termination of his trial on grounds unrelated to factual guilt or inno-

cence. In this case, Brown was directly responsible for halting his own trial. His voluntary motion at the end of the guilt phase was designed to preclude a determination by the trier of fact of the true sentence called for in his case. Under these circumstances, he should not be able to claim double jeopardy protection. Brown's Enmund motion

> "deprived [the state] of its valued right to one complete opportunity to convict those who have violated its laws (citation omitted). No interest protected by the Double Jeopardy Clause is invaded when the Government is allowed to appeal and seek reversal of such a midtrial termination of the proceedings in a manner favorable to the defendant." Scott, 437 U.S. at 100.

The fact that Brown was entitled to make a motion to dismiss the prosecution when he did is of no consequence to the

attachment of jeopardy and the state's right to appellate relief.

> We, of course, do not suggest that a mid-trial dismissal of a prosecution, in response to a defense motion on grounds unrelated to guilt or innocence, is necessarily improper. Such rulings may be necessary to terminate proceedings marred by fundamental error. But where a defendant prevails on such a motion, he takes the risk that an appellate court will reverse the trial court. Scott, fn. 13 at 100.

In this case, the trial court erroneously ruled in Brown's favor midway though his trial. Brown "took the risk" that the state could overturn the trial court on appeal and proceed to complete its case against him.

The Scott holding that jeopardy does not attach where a defendant

affirmatively seeks to avoid prosecution is entirely consistent with the holdings of Bullington and Rumsey. Brown's positive actions to halt his trial underscore the conclusion that jeopardy had not attached when he was sentenced to life imprisonment. Brown's motion was interposed and acted upon **before** his sentencing phase began. Jeopardy could not have attached at that juncture.

Any conclusion to the contrary is irreconcilable with established precedent and the sound administration of justice.

CONCLUSION

Review should be granted because the Florida Supreme Court has misinterpreted the United States Constitution. In so doing it has undermined the continuing proportional imposition and use of the death penalty nationwide.

In this case the state could not correct an erroneous ruling that Enmund foreclosed the death penalty. In future cases trial courts could take it upon themselves to rule that women or minorities or perhaps the poor cannot constitutionally be subjected to the death penalty. There could be cases where the death penalty itself is found per se unconstitutional. There is no limit to the number of arguments which the defense bar could make calling for the imposition of a life sentence before the

capital sentencing phase begins.

Rulings on such defense motions must be subject to appellate review to maintain the death penalty's proportionality. Review must not be rendered meaningless because of the artificial attachment of jeopardy.

The petitioner is not being alarmist when it asserts that the Florida Supreme Court's holding in this case will lead to the arbitrary imposition of the death penalty nationwide.

This petition should be granted.

Respectfully submitted,

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APPENDIX

Horace BROWN,

Appellant/Cross-Appellee,

vs.

The STATE of Florida,

Appellee/Cross-Appellant.

No. 85-2201.

District Court of Appeal of Florida,
Third District.

Jan. 20, 1987.

Rehearing Denied March 3, 1987.

Bennett H. Brummer, Public Defender, and N. Joseph Durant, Asst. Public Defender, for appellant/cross-appellee.

Robert A. Butterworth, Atty. Gen., and Steven T. Scott, Asst. Atty. Gen., for appellee/cross-appellant.

Before HENDRY, NESBITT and DANIEL S. PEARSON, JJ.

NESBITT, Judge.

Brown appeals from his conviction for first-degree murder and from his sentence for aggravated assault. The state cross appeals from the trial

court's finding that the death penalty was inapplicable to this case. We affirm Brown's convictions but reverse his sentences, holding that the sentence for aggravated assault in this case was outside of the statutory maximum and that the death penalty is applicable to Brown's conviction for first degree murder.

Brown was charged with first-degree murder by premeditation or during the commission of a robbery or trafficking in cocaine. In instructing the jury, the trial court failed to give the necessary instructions on the underlying crimes of robbery and trafficking. The jury returned a verdict of guilty to the first-degree murder charge without specifying upon which theory it had relied. Brown contends that the trial

court's failure to give the required instructions demands reversal of his conviction. We disagree.

[1] It is true that the failure of the trial court to instruct the jury on the underlying felonies was fundamental error since they constituted essential elements of the felony-murder charge. State v. Jones, 377 So.2d 1163 (Fla. 1979); Robles v. State, 188 So.2d 789 (Fla. 1966). The error, however, is subject to the harmless error rule as enunciated in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). If "[t]he reviewing court [is] satisfied beyond a reasonable doubt that the failure to so instruct was not prejudicial and did not contribute to the defendant's conviction," then the sentence may be upheld. Franklin v.

State, 403 So.2d 975, 976 (Fla. 1981); accord Knight v. State, 394 So.2d 997 (Fla. 981); see also Jones, 377 So.2d at 1167 (Adkins, J., dissenting) (the defendant must demonstrate that the failure to give the required instructions was prejudicial).

In the present case, Brown was also charged with robbery. The jury only convicted him, however, of the lesser included offense of aggravated assault. Since this amounted to an acquittal of one of the supporting felonies constituting the felony-murder charge, the jury's verdict of guilty as to first-degree murder must have rested upon the theory of either premeditation or murder committed during the act of trafficking in cocaine. Cf. Mahaun v. State, 377 So.2d 1158 (Fla. 1979) (jury

verdict of guilty of a lesser included offense of aggravated child abuse precluded the jury from finding defendant guilty of third-degree felony-murder in which that was the supporting felony). Because the trial court failed to give the jury an instruction on the supporting felony of trafficking, Brown's conviction may be upheld only if it affirmatively appears from the record that the jury's verdict is supported, beyond a reasonable doubt, by evidence which establishes murder by premediation so that the error was made harmless. See Franklin, 403 So.2d at 976; Knight, 394 So.2d at 1002; cf. Jones, 377 So.2d at 1163 (the state failed to contend that the failure to instruct on an underlying felony was made harmless where there was sufficient evidence to

establish premeditated murder).

[2] We find that there is ample evidence to support the conviction based upon premeditated murder. Brown concocted a scheme for a "rip-off" which he and his cohort perpetrated. The evidence demonstrates that he went to great lengths to dupe his victim and that his cohort armed himself as part of the scheme. There is further evidence that Brown admitted to his ex-girlfriend, over the telephone and soon after the murder, that he was personally responsible for the murder. While it is true that the evidence may be insufficient to show that Brown was the actual "trigger-man," the totality of the evidence supports the state's theory that Brown ordered the death of the victim in an execution-style murder, and

was therefore guilty, as a principal, of premeditated murder, pursuant to section 777.011 Florida Statutes (1985). See e.g., Antone v. State, 382 So.2d 1205 (Fla. 1980) (defendant, although not the actual murderer was properly given the death penalty where he supplied the weapon and pressured an accomplice to complete the task).

Even if we accept, arguendo, Brown's contention that his ex-girl-friend's testimony is the only piece of evidence which supports his conviction, the jury could have properly relied upon her testimony to return a guilty verdict. Though the reported time the phone call was received was disputed and rebutted with a prior inconsistent statement, the substance of the phone call was never rebutted, and therefore

State v. Moore, 485 So.2d 1279 (Fla. 1986) (prior inconsistent statement is insufficient evidence, standing by itself, to support a conviction for premeditated murder), is inapplicable. Cf. C.W. Ehrhardt, Florida Evidence §608.3 (2d ed. 1984) (a prior inconsistent statement is one which is used to impeach a witness where the prior statement directly conflicts with the witness' in-court statement).

Based upon the record, we find that there is sufficient evidence to support Brown's conviction under the theory of premeditation and because the state relied heavily upon his theory to obtain a conviction, we hold that the trial court's error in failing to give the required instructions did not prejudice Brown. Consequently, this was harmless

error. See Franklin, 403 So.2d at 976; Knight, 394 So.2d at 1002; see also Jones, 377 So.2d at 1165 (Adkins, J., dissenting); cf. Chapman, 386 U.S. at 23-25, 87 S.Ct at 827-829.

[3] After the jury returned its verdict of guilty as to first-degree murder, the trial court refused to submit the case to the jury for the penalty phase, holding that the death penalty was inapplicable due to the United States Supreme Court's decision in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). We agree with the state's contention that this case is not controlled by Enmund. In Enmund, the defendant was convicted of felony-murder. The United States Supreme Court held that the defendant could not be subjected to the death

penalty since he neither took a life, attempted to take life, intended to take a life, nor intended that lethal force be used. In the present case, the evidence demonstrates that Brown fully intended the use of deadly force in either ordering or committing the shooting of the victim. Therefore, the trial court should have submitted this case to the jury for the penalty phase of the trial following Brown's conviction for first-degree murder, pursuant to section 921.141, Florida Statutes (1985).

[4] Brown's final contention is that the trial court erred in sentencing him to ten years of imprisonment for aggravated assault. Aggravated assault is classified as a third-degree felony under section 784.021, Florida Statutes

(1985), punishable by a term of imprisonment not to exceed five years incarceration. Since the sentence was outside of the statutory maximum, it must be reversed.

We affirm Brown's convictions, but reverse his sentences, and remand for resentencing. The trial court should submit this case to a jury, which is properly death-qualified pursuant to Lockhart v. McCree, _____ U.S. ____, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), for a determination of the penalty to be imposed for this capital felony. Further, the trial court should resentence Brown for aggravated assault within the statutory maximum. Accordingly, we

Affirm in part, reverse in part and remand for resentencing.

HORACE BROWN, Petitioner vs. **STATE OF FLORIDA**, Respondent. Supreme Court of Florida. Case No. 70,333. February 4, 1988. Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions, Bennett H. Brummer, Public Defender and N. Joseph Durant, Jr., Assistant Public Defender, Eleventh Judicial Circuit, Miami, Florida, for Petitioner, Robert A. Butterworth, Attorney General and Steven T. Scott, Assistant Attorney General, Miami, Florida, for Respondent.

(SHAW, J.) We review Brown v. State, 501 So.d 1343 (Fla. 3d DCA 1987), to resolve conflict with Fasenmyer v. State, 457 So.2d 1361 (Fla. 1984), and Troupe v. Rowe, 283 So.2d 857 (Fla. 1973). We have jurisdiction. Art. V. §3(b)(3), Fla. Const.

Petitioner Brown was convicted of first-degree murder following a jury trial. The evidence at trial was that Brown, with the aid of a henchman, devised a plan to rob a fellow drug dealer, Gomez. Brown and the henchman,

who was armed, lured Gomez to Brown's home and the three men left for an unknown destination. Soon, thereafter, Gomez was killed and Brown and his henchman returned briefly to the Brown home. Fearing vengeance, they checked into a motel. Brown advised household members by phone that he had to kill Gomez, attempted to concoct an alibi, and took great pains to conceal his location. Brown was indicted for first degree murder and tried under theories of premeditation and felony murder based on robbery and trafficking in cocaine. Through an oversight, the jury was not instructed on the underlying felony of trafficking. The jury returned a general verdict of guilty of first-degree murder, which would normally be followed by the presentation of aggra-

vating and mitigating evidence to the jury in accordance with section 921.141, Florida Statutes (1981). However, the judge ruled as a matter of law that Enmund v. Florida, 458 U.S. 782 (1982), barred imposition of the death penalty, dismissed the jury, and sentenced Brown to life imprisonment. Thereafter, Brown appealed the conviction and the state cross appealed the ruling on Enmund and the life sentence. The district court affirmed the first-degree murder conviction holding that failure to instruct on the lesser included offense was harmless error, reversed the life sentence on its finding that the judge misapplied Enmund, and remanded for resentencing in accordance with section 921.141.

We first address the issue of whether failure to instruct on the

underlying felony of trafficking in cocaine was harmless error under the circumstances. The district court reasoned that the state's primary theory was premeditation and concluded

> there is ample evidence to support the conviction based upon premeditated murder. Brown concocted a scheme for a "rip-off" which he and his cohort perpetrated. The evidence demonstrates that he went to great lengths to dupe his victim and that his cohort armed himself as part of the scheme. There is further evidence that Brown admitted to his ex-girlfriend, over the telephone and soon after the murder, that he was personally responsible for the murder. While it is true that the evidence may be insufficient to show that Brown was the actual "triggerman," the totality of the evidence supports the state's theory that Brown ordered the death of the victim in an execution-style murder, and was therefore guilty, as a principal, of premeditated

> murder, pursuant to section 777.011, Florida Statutes (1985).

Brown, 501 So.2d at 1344-45. We agree.

At the beginning of the penalty phase, before bringing the jury in, the judge asked for and received arguments from both parties on whether Enmund barred the death penalty. In its argument the state specifically cited cases where this Court has rejected the argument that Enmund barred the death penalty for non-triggermen. State v. White, 470 So.2d 1377 (Fla. 1985); Hall v. State, 420 So.2d 872 (Fla. 1982); Ruffin v. State, 420 So.2d 591 (Fla. 1982). However, without substantive explanation, the judge ruled that Enmund barred the death sentence and proceeded to dismiss the jury and impose a life sentence. It is uncontroverted that the

ruling was in error. Although the state might have sought interlocutory review by writ of certiorari after the ruling and prior to the imposition of the sentence on the grounds that the ruling was a departure from the essential requirements of law, White, Hall, and Ruffin, and that imposition of sentence would cause irreparable harm under Arizona v. Rumsey, 467 U.S. 203 (1984), and Bullington v. Missouri, 451 U.S. 430 (1981), it failed to do so.

The facts of this case are on point with Rumsey. There the trial court erred in ruling that the death penalty could not be imposed, but, upon reversal and remand, imposed a death sentence. Relying on Bullington, both the Arizona and United States Supreme Courts held that the erroneous ruling acquitted the

defendant of the death penalty and terminated jeopardy. Accordingly, it was held to be a violation of double jeopardy to reopen the sentencing phase and to impose the death penalty. The state attempts to distinguish Rumsey and Bullington by arguing that the judge did not conduct a penalty phase as required by section 921.141 and that the life sentence was thus illegal. We disagree. The judge opened the penalty phase by hearing arguments and by ruling on a matter of law which did not require the presence of the jury. Even though the ruling was erroneous, the procedure was correct. Having so ruled, it would have been a futile exercise to present evidence of aggravation and mitigation to the jury or to pronounce a "but for" Enmund death sentence. Life imprison-

ment is a legal sentence under section 921.141 and we are not faced with a sentence contrary to statute. On the authority of Rumsey, we quash that portion of the district court opinion reversing the life sentence and remand the case for further proceedings consistent with this opinion.

It is so ordered. (McDONALD, C.J., and OVERTON, EHRLICH, BARKETT, GRIMES and KOGAN, JJ., Concur.)

IN THE SUPREME COURT OF FLORIDA

FRIDAY, MARCH 25, 1988

HORACE BROWN,	**	
Petitioner,	**	
vs.	**	Case No. 70,333
STATE OF FLORIDA,	**	District Court of Appeal,
Respondent.	**	3d District No. 85-2201

On consideration of the motion for rehearing filed by attorney for respondent,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

By: //s//
Chief Deputy Clerk

cc: Hon. Louis J. Spallone, Clerk
Hon. Richard P. Brinker, Clerk
Hon. Harold Solomon, Judge

Steven T. Scott, Esquire
N. Joseph Durant, Jr., Esquire